Vencor Hospital-Los Angeles and United Health Care Employees (UHCE), National Union of Hospital and Health Care Employees, American Federation of State, County, and Municipal Employees, AFL-CIO. Cases 31-CA-20654, 31-CA-20699, and 31-RC-7182

August 13, 1997

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX AND HIGGINS

On August 19, 1996, Administrative Law Judge Clifford H. Anderson issued the attached decision. The Charging Party filed exceptions and a supporting brief, the Respondent filed an answering brief, and the Charging Party filed a reply brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions and to adopt the recommended Order.

The Charging Party's sole exception to the judge's decision involves the dismissal of 8(a)(3) and (1) charges against the Respondent regarding its termination of Michael Wade on the ground that he violated hospital policy by failing to stay with his patient during a Code Blue. Specifically, the Charging Party claims that the judge's conclusion is erroneous because he improperly relied on hearsay testimony. We disagree. The testimony in dispute is that of Diane Ashby and Billie Ann Schoppman in which they testified that they were told by every one of the respiratory therapists they interviewed that hospital policy required that a therapist remain with his or her patient during a Code Blue. In admitting this testimony, however, the judge specifically ruled that such testimony was neither offered, received, nor considered for the truth of the matter asserted, but merely to establish that other respiratory therapists had told Ashby and Schoppman what they thought was hospital policy. Moreover, based on this testimony the judge specifically found that Ashby and Schoppman believed that all respiratory therapists knew that hospital protocol required a therapist to stay with his or her assigned patient. Although the judge at one point erroneously stated that the Respondent established that other respiratory therapists knew of the protocol, in view of the judge's explicit ruling on and subsequent discussion of the disputed testimony, we find that such misstatement was inadvertent and that the judge did not improperly rely on hearsay testimony in finding that Wade's discharge did not violate the Act.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Vencor Hospital-Los Angeles, Los Angeles, California, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

CHAIRMAN GOULD, dissenting.

I dissent. The administrative law judge found that "the General Counsel has met his burden of persuasion that antiunion sentiment was a substantial and motivating force in the decision to discharge Michael Wade." With that finding under my concurring opinion in Paper Mart, 319 NLRB 9, 12 (1995), a violation of this statute is established. Since the Supreme Court in Transportation Management stated that it was "plainly rational and acceptable" for the Board to construe the Act so "that to establish an unfair labor practice the General Counsel need show by a preponderance of the evidence only that a discharge is in any way motivated by a desire to frustrate union activity," the administrative law judge's findings and the evidence clearly support a violation. As I stated in my opinion, the "employer's showing that the adverse action would have occurred in any event would go only to the remedy issued against the employer." Id. at 12.

The administrative law judge found that Wade would have been discharged for failing to meet with his assigned patient under the protocol and that the Employer had established a protocol requiring such attendance. Given the administrative law judge's findings, I do not believe that it is appropriate to provide a reinstatement remedy. But backpay, minus interim earnings or those which could have been obtained through reasonable diligence, is an appropriate remedy for this violation and I would hold that that remedy should be imposed from the date of discharge until the date of this opinion.

¹The Charging Party has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

¹NLRB v. Transportation Management Corp., 462 U.S. 393, 398–399 (1983).

Ann L. Weinmann, Esq., for the General Counsel.

Timothy F. Ryan, Janet Dickenson, and, on brief, David C. Wright, Esqs. (Morrison & Foerster), of Los Angeles, California, for the Respondent/Employer.

Michael D. Four, Esq. (Schwartz, Steinsapir, Dohrmann & Sommers), of Los Angeles, California, for the Charging Party/Petitioner.

DECISION, CERTIFICATION OF ELECTION RESULTS AND REPORT ON OBJECTIONS

STATEMENT OF THE CASE

CLIFFORD H. ANDERSON, Administrative Law Judge. I heard this consolidated case in trial on various days in November and December 1995 and February 1996. The matter arose as follows.

On June 27, 1994, the United Health Care Employees (UHCE), National Union of Hospital and Health Care Employees, American Federation of State, County, and Municipal Employees, AFL–CIO (the Union, the Charging Party, or the Petitioner) filed a charge with Region 31 of the National Labor Relations Board docketed as Case 31–CA–20654, against Vencor Hospital-Los Angeles (the Respondent or the Employer). On July 7, 1995, the Regional Director for Region 31 issued a complaint and notice of hearing respecting Case 31–CA–20654. The Respondent filed a timely answer thereto.

On August 1, 1994, the Union filed a charge, docketed as Case 31–CA–20699, against the Respondent and amended that charge on August 23 and 29, November 30, and December 22, 1994. On February 28, 1995, the Regional Director issued an order consolidating cases, consolidated complaint and notice of hearing consolidating the two cases. The Respondent filed a timely answer to the amended consolidated complaint. On November 1, 1995, the Regional Director issued an order partially withdrawing consolidated complaint and notice of approval of request for partial withdrawal of charge (Case 31–CA–20699). At the hearing the complaint and answer were further amended.

The amended consolidated complaint alleges and the amended answer denies that the Respondent engaged in various acts and conduct violative of Section 8(a)(1) of the National Labor Relations Act (the Act). The complaint further alleges and the answer denies that the Respondent issued a written warning to employee Verona Steen and discharged its employees Viviana Freeman and Michael Wade in violation of Section 8(a)(3) and (1) of the Act.

On April 28, 1994, the Petitioner filed a petition with Region 31, docketed as Case 31–RC–7182, seeking to represent certain employees of the Employer. The parties entered into a Stipulated Election Agreement respecting the petition approved by the Regional Director on May 19, 1994.² An election was conducted on July 15, 1994,³ pursuant to that agree-

ment. The tally of ballots showed that of approximately 73 eligible voters, 68 cast ballots of which 24 were cast for the Petitioner, 33 were cast against the Petitioner, 11 ballots were challenged, and there were no void ballots. On July 21, 1994, the Petitioner filed timely objections to conduct affecting the results of the election.

On August 8, 1995, the Regional Director issued a report on challenges and objections, order directing hearing, notice of hearing and order consolidating cases. The report, inter alia, directed that a common hearing be held respecting the 11 challenged ballots and the Petitioner's objections and related matters, along with the issues raised in the amended consolidated complaints and that a report on the objections and challenges issue as part of the decision dealing with the unfair labor practice allegations. At the hearing the Petitioner and the Employer entered into a stipulation providing that two of the challenged individuals, Lorraine Adams and Terry Shock, were not in fact eligible to vote in the election and that their votes should not be opened and counted. The stipulation further provided that the remainder of the challenges were no longer determinative of the results of the election and that a certification of results should be issued reflecting the fact that the Petitioner did not receive a majority of valid votes cast in the election.

Upon the entire record, including helpful oral argument by the General Counsel and scholarly briefs from the Charging Party and the Respondent, and from my observation of the witnesses and their demeanor, I make the following⁴

FINDINGS OF FACT

All parties were given full opportunity to participate at the hearing, to introduce relevant evidence,⁵ to call, examine and

certification of representative issued to the Union concerning the following unit of the Hospital's employees:

All technical employees including licensed vocational nurses, x-ray technicians and respiratory therapists excluding all other employees including registered nurses, professional employees, non-professional employees, guards and supervisors as defined in the Act

⁴ As a result of the pleadings and the stipulations of counsel at the trial, there were few disputes of fact regarding collateral matters. Where not otherwise noted, the findings here are based on the pleadings, the stipulations of counsel, or unchallenged credible evidence.

⁵Michael Wade, who is named as an alleged discriminatee in the complaint, but who is not a Charging Party, was called as a witness by the General Counsel. Prior to the commencement of cross-examination, counsel for the Respondent requested and received from the General Counsel Wade's Board prepared investigatory affidavit. Counsel for the Respondent offered the affidavit into evidence as substantive evidence under the theory that it is not hearsay by virtue of Fed.R.Evid. 801(d)(2) respecting admissions by party-opponents. Counsel for the General Counsel and the Charging Party opposed the offer to the extent it was predicated on a determination that Wade was a party-opponent within the meaning of the term as used in the Federal Rules of Evidence.

The issue was narrowed in argument at trial and on brief to the question of whether or not, for purposes of applying Fed.R.Evid. 801(d)(2), an alleged discriminatee in an unfair labor practice complaint who did not file a charge in the matter is a "party-opponent." The Board and the courts have had occasion in the past to deal with the status of alleged discriminatees as "parties" in Board proceedings under Fed.R.Evid. 615. See, e.g., *Unga Painting Corp.*, 237 NLRB 1306 (1978), and *NLRB v. Stark*, 525 F.2d 422 (2d Cir. Continued

¹The case was postponed in midtrial as a result of the hiatus in the operating budgets of certain portions of the Federal Government, including the National Labor Relations Board (the Board), in the winter of 1995–1996.

²The agreed-on bargaining unit was:

All non-professional employees including CNA's [Certified Nurse Assistants], maintenance engineers, EVS/housekeeping, dietary/ cafeteria and cook/cafeteria employees, cardiac monitoring technicians, medical records technicians, pharmacy technicians, physical therapy assistants, secretaries, unit clerks, purchasing clerks, admitting clerks, and receptionists and excluding all other employees including registered nurses, licensed vocational nurses, x-ray technicians, respiratory therapists, professional and confidential employees, guards and supervisors as defined in the Act.

³On the same date an election was conducted pursuant to a separate representation petition filed by the Union which resulted in a

cross-examine witnesses, to argue orally and to file posthearing briefs. Posthearing briefs were filed on March 29, 1996.

I. JURISDICTION

The complaint alleges and the answer admits that at all material times the Respondent has been a corporation with an office and place of business in Los Angeles, California, where it has been engaged in the operation of an acute care hospital. The Respondent, in conducting its business operations at the facility, enjoys annual revenues in excess of \$250,000 and annually purchases and receives at the facility goods and services directly from locations outside the State of California of a value in excess of \$50,000.

Based on the above, I find that the Respondent has been at all material times an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

The complaint alleges, the answer admits, and I find that the Union has at all times material here been a labor organization within the meaning of Section 2(5) of the Act.

III. ALLEGED UNFAIR LABOR PRACTICES

A. Background

The Respondent is a national corporation operating numerous hospitals in various States of the country including one facility in Orange County, California, and, since 1991, an 81-bed acute care hospital employing approximately 200 employees in Los Angeles, California (the facility or the Hospital). Steve Turner is the Respondent's regional director with multifacility responsibilities including corporate responsibilities for the two facilities named above. Billie Anne Schoppman has been the Los Angeles facility hospital administrator since March 1993, and has overall responsibility for the facility's operations. Diane Ashby is the facility director of respiratory therapy. Each is an agent and supervisor of the Respondent.

The Union represents employees in the health care industry. It commenced an organizing drive at the facility the spring of 1994.6 Two representation petitions were filed by the Union in late April seeking elections in a technical and a nonprofessional unit of the Respondent's employees. Elec-

tions were conducted on July 15 in each unit. The results of the nonprofessional employee election in Case 31–RC–7182 were initially under challenge here as a result of determinative challenges to disputed ballots. As a result of stipulations respecting certain challenged ballots entered into by the parties during the course of the trial, the contested ballots were no longer determinative of the results of the election. With the concurrence of the parties, I certified on the record that the results of the election were no longer in arithmetic contest and that the Union did not receive a majority of valid votes cast in the election.⁷ The second election held in the technical unit the same day favored the Union and, on July 28, the Regional Director certified the Union as the exclusive representative of the technical employee unit.

B. The Allegations of the Complaint

The complaint in paragraphs 6, 7, and 8 recites a series of actions by the Respondent's agents which are alleged to violate Section 8(a)(1) of the Act. Thus, complaint paragraph 6 alleges that Steve Turner in or around April 29, 1994, at the facility, interrogated an employee concerning the employee's union activities and or sympathies, and created the impression of surveillance of the employees union activities and/or sympathies. Complaint paragraph 7 alleges that Dianne Ashby, on or about April 29 by telephone from the facility, interrogated an employee concerning employees' union activities and/or sympathies and directed the employees to cease their union organizing activities. Complaint paragraph 8 alleges that Billie Ann Schoppman, on or about March 12 at the facility, interrogated an employee concerning the employee's union activities and sympathies, and told an employee that selection of a union would prevent employees from discussing their problems with management.

The complaint also alleges in paragraphs 9 and 10 that the Respondent discharged employees Viviana Freeman on June 16, Michael Wade on June 21, and issued a written disciplinary warning to employee Verona Steen on August 18. The complaint alleges the Respondent took these actions because of the employees' union and/or other protected concerted activities in violation of Section 8(a)(3) and (1) of the Act.

C. Evidence

1. Conduct alleged to violate Section 8(a)(1) of the Act

A general summary of the evidence offered on the allegation of the complaint appears below categorized primarily on an allegation by allegation basis. In order to avoid repetition, evidence relevant to several allegations is presented only once.

a. The allegations respecting Steve Turner

Michael Wade testified that, in May or early June, he was asked to meet Steve Turner in his office where the two had a conversation which Wade estimated was 30 to 40 minutes in length. Wade described the conversation during his direct examination by counsel for the General Counsel as follows:

Well, [Turner] called me in and he asked me—his first question was: "What is this about a union?" And

^{1975).} The issue is not free from difficulty and presents policy issues the Board has expressed concern about in other contexts. I ruled at the hearing, and here reaffirm, that in the absence of clear Board precedent on the narrow question, I shall not find an alleged discriminate in Board unfair labor practice proceedings is a partyopponent to a respondent under Fed.R.Evid. 801(d)(2). Thus, I find an alleged discriminatee, who is not also a charging party, is not a party-opponent to the Respondent insofar as that term applied to Fed.R.Evid. 801(d)(2) and his affidavit does not fall within the reach of that provision. As the General Counsel correctly argues, the implications and likely consequences to Board unfair labor practice litigation if an alleged discriminatee is regarded as a party-opponent under Fed.R.Evid. 801, and other derivative provisions of the Federal Rules of Evidence such as set forth in Sec. 613(b), are sufficiently significant that the Board rather than an administrative law judge should initiate such an important and new evidentiary construction.

⁶ Dates refer to calendar year 1994 unless otherwise indicated.

⁷This certification rendered the preparation of a report on challenged ballots unnecessary.

I said, "What union?" He said, "Well, I hear that the people are getting a union together and I want to know what is it that the people want." So, I said, "I think they want representation." And he said, "Well, what are the problems that would make them want representation?" And I said, "Well, Steve, the problems that make them want representation are that they hear things that people are tape recording, conversations; that's been more than once; once or twice this person was allowed to carry a tape recorder." I said, "And they're unhappy about the wage cuts, the proposed wage cuts." There was supposed to be a wage freeze and then they put forward a cut. And at that point he said, "Well, we knew that when we instituted these cuts that this would bring about a union activity." So, I said, "Well, that's exactly what they're concerned about." And then he said, "Well, you know, we have you pegged kind of as a union leader around here." I said, "Well, Steve, I'm not a leader." I said, "I go out and get cheesecake and whatever, but I'm not really a leader. I have my own opinion about things but I'm not a leader." And he said, "Well, you know, Mike Bar is not going to take too kindly to this." And I said, "Well, who is Mike Bar?" I said, "I don't know Mike Bar." He said, "Well, Mike Bar is the owner of the company." I said, "Well, Steve, I know he put this whole thing together--" and this, that, and the other, I said--"but a lot of things that are happening I don't think are right,' and I went on to delineate that. And then he said, "Well, we kind of had you pegged as a guy that could help us turn the corner on this thing." And I saidagain, I said, "I have problems that are much bigger than Vencor or the Union getting here." I said, "My daughter's being beat-up every day in public school; I need to put her in private school. My problems are much bigger than Vencor." He said, "Well, we'll be able to do something to help you to get her in school." I said, "You don't have to do that. My grandfather will help me with that, as far as getting her into this Christian school." I said, "You don't have to do that," I said, "but I appreciate your help," I said-but again, I reiterated to him that my problems were much bigger than that.

And so he maybe asked me a couple of other questions and I told him again about the concerns about—I may have mentioned stuff about the promotions and stuff, cause we had some friction over a lot of other issues, so we discussed stuff randomly from then on.

Counsel for the Respondent returned to this testimony on cross-examination. He elicited the following:

Q: And I want to see if I wrote this down correctly—did you testify that he had you—they had you pegged as a union leader?

A: Yes. He said they had me pegged as "kind of a leader" was the words he used. They had me pegged as kind of a leader around there.

Turner did not testify. Schoppman testified that Turner spoke to Wade on his own initiative because he liked Wade and saw him as one of the leaders in the Hospital.

b. The allegations respecting Diane Ashby

Michael Wade testified that he perceived problems at the facility before the employees initiated their union organizing efforts, and had sought to talk to both Schoppman and Diane Ashby about those problems only to be put off. Wade testified that by the time he finally received the telephone call from Ashby the employees had already undertaken an authorization card organizing campaign and management was aware of that fact. Wade testified that Ashby:

called me at home and told me that—something about a—"Well, Michael, you know, you shouldn't be with the Union." She started telling me about the anti stuff. I said, "Diane, it's really too late now," and that's what I told her candidly. I said, "It's too late. They've already—it's already in progress. It's not something that I can stop."

Diane Ashby testified categorically and unequivocally that she never had a telephone conversation or face-to-face conversation with Wade in which the Union, the NLRB representation petition, or a union election was discussed.

c. The allegations respecting Billie Ann Schoppman

Viviana Freeman, a licensed vocational nurse (LVN), was supervised by Pauletta Lawson in early 1994 and was concerned when Lawson was terminated. She went to Billie Ann Schoppman's office on or about May 12 and had a conversation alone with Schoppman. Following discussion respecting Lawson, and a wide variety of other matters, the conversation turned to the Union. Freeman testified:

[W]e were talking about the Union and she was talking about that there was a handful of militants that were out to destroy Vencor, and I replied that I didn't consider myself a militant. And then she wanted to know if I was for Vencor I told her I was for what was right.

. . . .

I remember asking her something about how could she deal with what was going on here, and then she went off into about Vencor, and I went on to tell her about my lifestyle—do you want me to go on?

Q: If it relates to the Union, yes.

A: Well, yes. She said, she told me, "Well, you know, Viviana, if the Union comes in you will not be able to come in here and talk with me the way you're talking to me." And I told her, "Yes, I would." Even though I'd have a representative.

In revisiting the conversation Freeman testified that Schoppman:

just made a statement that "there was a handful of people out—" militants is the word she used—"to destroy Vencor." I replied, "I don't consider myself the Union." Then she wanted to know if I was for Vencor. I told her that I was for what was right. Then she went on to say, "Well, you know, Viviana, you won't be able to call—make an appointment to just come in—" in other words, the way I took it was—"just like you coming in here to talk to me, if the Union was in here

then you'd have to go through your representative and they would be the one talking." I, in turn, told her, "Oh, they may be in here with me but I will be talking for myself."

Schoppman testified that at her meeting with Freeman on May 13, *a* union generally rather than *the* Union was discussed and that Freeman asserted that she was in support of "what was right at the hospital," but that "there were some things going on that she didn't like" such as the wages. Schoppman testified that Freeman during the conversation expressed both dissatisfaction and satisfaction with aspects of the operations of the Hospital and working conditions. Schoppman denied asking Freeman how she felt about the Union or how she would vote in the election.

Near the end of the meeting Schoppman recalled that Freeman told her: "I'm quitting the end of July anyway, I just want to do this first." Although Freeman did not indicate the meaning of the words used, Schoppman testified she took Freeman's meaning to be that she wanted to "go through the union campaign and vote." Schoppman testified that she did not come to the view that Freeman was prounion in this conversation. Freeman testified that while she did tell Schoppman that she was considering quitting, she denied being specific as to a date or even a month when she would do so.

- 2. Conduct alleged to violate Section 8(a)(3) and (1) of the Act
- a. Evidence of the Respondent's animus and knowledge of employee union activities

The Respondent's hospital employees were engaged in union organizing in April 1994. Representation petitions were filed, as discussed supra, on April 28. Schoppman testified that she was informed by Diane Ashby in late April that employees were signing authorization cards. Soon thereafter the Respondent initiated an active campaign involving hospital management and supervision, labor consultants and labor counsel, to evaluate employee views, formulate employer positions, and present the Respondent's view to employees eligible to vote in Board-conducted representation elections that it would be better if the Union did not become the employees' representative for purposes of collective bargaining.

Althea Bogle-Lewis, the sister of Simone Bogle, a certified nursing assistant and wife of respiratory therapist Tal Lewis, was, until her discharge on July 19, 1994, a house supervisor for the Respondent at the facility. She testified at some length respecting the Respondent's union campaign. Bogle-Lewis testified that the first meeting of supervision respecting the Union was held on April 25 attended by herself, Jaime Ames, assistant administrator, and Donna Bailey, director of nurses. At this meeting Bailey informed the others that employees were engaging in union activities and that employee Verona Steen was the instigator along with another employee.

This initial meeting was followed by another on April 28, attended by about eight house supervisors and department heads and by subsequent meetings of higher level supervisors, supervision, and employees. Bogle-Lewis testified that supervision was instructed to be attentive to employee senti-

ments and to determine from their observations and conversations with employees the likely voting preferences of eligible employees. Such preference estimates were recorded and submitted to management through the course of the campaign. The documents used in recording the employees' views had been discarded or destroyed by the time of the hearing here. Bogle-Lewis recalled that the submitted lists recorded employees Verona Steen and Viviana Freeman as union supporters. Schoppman testified she had no recollection of what the records or tally sheets reflected respecting these employees.

A preelection representation case hearing was scheduled for May 18. Although the hearing did not go forward because consent election agreements were reached obviating the need for a hearing, the interested parties and individuals were physically present in the Board's offices that day during the prehearing discussion and negotiation process that ultimately made a representation case hearing unnecessary. There is no dispute that representatives of the Respondent and the Union were present as well as perhaps a dozen employees including Freeman, Wade, and Steen. These employees sat with and talked to the union representatives and were observed in these activities by the Respondent's agents including Schoppman. Schoppman testified, however, that she regarded the attending employees as simply curious or representative of interested employees and not by virtue of their conduct that day associated or allied with the Union.

Bogle-Lewis testified that she attended a meeting of supervisors the day following the scheduled representation case hearing. At that meeting Assistant Administrator Ames, as Bogle-Lewis recalled, addressed the employees who attended the representation meeting:

She said—she listed the names of the employees that attended the hearing the day before. And she said, "These are the employees that were not loyal to Vencor after all that Vencor has done for them." And that these are the employees that we need to pay special attention to and to monitor their work performance.

Bogle-Lewis also recalled that Ames told those attending the meeting:

We should monitor the employees; monitor their job performance; keep an eye on them, and that they're ungrateful after all that Vencor has done for them, and if they don't do what they're supposed to do—I don't remember her exact words, but as I said earlier it was—I believe it was implied that they would be terminated.

- Q: You took that implication from what Jaime Ames said to you; is that correct?
 - A: Yes.
 - Q: Did you consider that—

A: I'm sorry. Also, she said, "We need to get them out of here. They do not belong here at Vencor; those employees do not belong here at Vencor because they do not support Vencor."

Neither Ames nor any other individual placed at the meeting testified respecting it.

b. Allegations respecting Viviana Freeman

Viviana Freeman testified that she was involved in the union organizing campaign and attended the scheduled hearing on May 18. She asserted that at the employee meetings attended by the Respondent's labor consultant she spoke up asserting that the Respondent had made major mistakes and that unfair labor practices were being committed at the facility. She continued:

I just told him that it was wrong and they had to be stopped and that's why a union was coming in; we needed somebody to speak for us.

Freeman also testified that in her May 11 or 12 meeting with Schoppman, she told her:

I was talking about I was tired, you know, "I'm getting tired." I was tired of coming in there and being stressed out; watching people just treated any kind of way, you know, and I guess it upsets me.

In that context she mentioned that she was considering quitting her employ, but was not specific respecting the matter. She testified she did not predict even to a month when she might resign. She further recalled that her comments elicited no response from Schoppman.

Later in May, Freeman went to the office and spoke to Supervisors Donna Bailey and Roxanne Cohen respecting a personnel matter. During the course of that exchange, Donna Bailey told Freeman: "Oh, Viviana, I hear you're quitting." Freeman responded: "You couldn't have gotten that from anybody but from Billie Anne [Schoppman]. I'm considering." And Bailey responded, "Well, personally, I've never had any problems with you and I wish you luck."

Freeman testified that thereafter: "[W]ord was going around—'Viviana's quitting. Viviana's quitting." CNA Louise Johnson told Freeman "I hear your quitting." Thereafter Freeman asked Schoppman how Louise Johnson knew she was considering quitting without receiving an answer.

In late May or early June, Freeman went to the nursing office and spoke to Roxanne Cohen respecting a leave. Although a per diem employee who did not receive vacation, she wanted to ensure time off in July was scheduled so that she could make travel reservations to care for a sick relative. She testified she explained the situation to Cohen who said she would get back to her. Cohen thereafter met with Freeman on the facility floor a short time later. A discussion ensued respecting the specifics of the time off. Cohen commented to Freeman in Freeman's recollection, that she would be missing the union election set for July 18 to which Freeman replied that she "would definitely be back in time for the election."

Roxanne Cohen became assistant director of nursing in late May having earlier been a nursing supervisor. She described the initial portion of her June 9 morning meeting with Freeman consistently with Freeman. She recalled further:

I gave her the form and she filled it in right there and gave it back to me and when I noticed the dates I just said to her, gee, you won't be here for the union election. And she kind of laughed and said it doesn't matter because I'm going to quit by the end of July anyway,

so I won't be here. And so I took the form from her and she left.

Cohen testified that she had not previously known that Freeman was going to leave her employment with the Hospital and was surprised given that she knew that Freeman was an active union supporter.

Cohen testified she took the form to Schoppman because the director of nursing at the time was working a different shift. Cohen related to Schoppman the conversation she had just had with Freeman and Schoppman asked her to record the specifics on the leave form which she did. The form bears the following entry in the "additional Discussion/Comments:" portion:

Viviana [Freeman] stated that she was going to terminate at the end of July, she stated this on 6–9–94 when she was filling out her vacation request—R Cohen, Nursing Supervisor

Cohen thereafter left the form with Schoppman and departed. Schoppman testified that Cohen brought the Freeman leave request form to her on June 9, uncertain of how to proceed. After learning of Freeman's assertions to Cohen that Freeman was going to quit, Schoppman contemplated granting the leave—there was a family emergency—but simply replacing Freeman because there would be little work time remaining in July on her return and, secondly, because she had another person in mind who would fill the spot vacated by Freeman. She testified that since her mind was not as yet made up, the leave request was processed in the normal course. Thereafter she finalized her plans and arranged to meet with Bailey and Freeman.

On the morning of June 16, 1994, Bailey and Schoppman held a meeting with Freeman. Schoppman recalled that when Freeman arrived she told her that she had accepted her resignation. Freeman responded: "You've got to be kidding me. You can't do this." Schoppman testified as to further events, she recalled stating:

You know, Viviana, you resigned. You let me know that you were going to be leaving in July, and I know you have an emergency so I want you to feel—and certainly paying you so that you can take your vacation and don't feel like you have to be pressured to come back.

[Ms. Freeman] grabbed the check out of my hand and said, "Fine. Do whatever you want."

Freeman recalled the conversation similarly in part save that when Schoppman told her she had accepted her verbal resignation, she responded: "You can't do that. I gave you nothing in writing." She further recalled that Schoppman demurred asserting that she could because she had researched it.

Schoppman testified that Freeman took the check and never having sat down during the brief meeting left the office. A few minutes later Schoppman and Bailey left the office. Schoppman saw Freeman talking animatedly with respiratory therapists Tal Lewis and Michael Wade in the hall. She testified, deleting the questions of counsel:

I was walking down the hallway and as soon as I started to approach them they stopped talking but they were talking loudly in the hallway, so I approached Viviana [Freeman] and I said, "Viviana, we don't need to be talking in the hallway. Come on, let's walk on out." Then I walked her down the hallway, the center hallway to the exit door. I stood at the door and she walked out the door. I stayed there until she walked out the door.

Schoppman testified she then returned to her office. Essentially immediately on arriving at her office she heard a code called overhead. She testified:

Well, I thought this was going to be quite a day, so I thought I would go out and investigate and make sure it was a change of shift and there was some confusion; several people had seen Viviana walk down the hallway so I knew there was some confusion out there so I wanted to make sure everything was okay, so I walked toward the code.8

Freeman recalled to the contrary that Schoppman to her surprise followed her out of the office despite Freeman's exhortation that there "was no need for that," physically escorted her out of the office, down the hall and out of the hospital monitoring her departure thereafter. During the walk down the hall with Schoppman beside or just behind her, Freeman testified they came on Lewis and Wade who were walking down the hall talking to each other.

c. Allegations respecting Michael Wade

The Hospital cares for patients with acute needs on a 24-hour basis utilizing three shifts of employees. As part of its patient care team it employs respiratory therapists who work in the respiratory therapy department. Patients are assigned particular respiratory therapists on each shift. When shifts change there is a period of overlap when employees of both shifts are present. For example at relevant times the night shift ended at 7 a.m. while the day shift started 30 minutes earlier at 6:30 a.m. It is hospital protocol that the respiratory therapists on the departing shift bring the arriving respiratory therapists up to date on the condition of and other relevant circumstances concerning their assigned patients. The procedure is referred to in the testimony as giving or getting "report" on particular patients.

On June 16, 1994, Michael Wade, an experienced respiratory therapist, testified he arrived at work as usual to begin the day shift at 6:30 a.m. His night-shift counterpart, Tal Lewis, was caught up in the press of other matters and was unable to start the processing of reporting on patients to Wade as the start of Wade's shift. The two testified they commenced report on or about 6:45 a.m. in the respiratory therapist department, but apparently did not conclude it when a "Code Blue" was called and all the therapists in the area

including Wade and Lewis responded by going immediately to the patient's room.

The code was called respecting a patient¹⁰ assigned to both Wade and Lewis. They testified that on their arrival at the patient's room's entrance they discovered a large number of health care workers in the room tending to the patient, including three respiratory therapists, along with the substantial amount of equipment required in such circumstances. Wade testified that the room was so full of people and equipment that physical entry into the room would have been difficult, if not impossible, and that he could observe from the patient's doorway that the physical therapists already present in the room were fulfilling all the functions of respiratory therapists in such situations and did not need or desire assistance or relief. Wade testified that he and Lewis then withdrew from the patient's room entrance some 10 to 20 feet to the north down the corridor and there Lewis resumed giving his report to Wade with emphasis on the coding patient.

Lewis testified that as his hallway report was concluding, Schoppman passed by and went to the patient's room and then returned to the two men. She said something to Wade such as whether he was working or that he might be needed in the patient's room. Lewis recalled that he told Wade that he had better be punching out and then headed toward the corridor to the timeclock. He observed Wade turn and go the other way toward the patient's room. Lewis testified that he punched out and left the facility at that point. He denied that he met or had a conversation with Freeman during this sequence having only seen Freeman earlier in the shift without talking to her. He testified he did not learn of Freeman's termination until a later date.

Wade testified that Schoppman walked by as Lewis was approaching the timeclock. He recalled Schoppman asked him if it was not a little early to be taking a break to which he answered that he was not taking a break but was rather taking report from Lewis. At that point Wade observed Lewis punch out and leave and Schoppman enter the cafeteria. He returned to the patient's room and there and in the nurses area outside the patient's room attended to various matters relevant to the patient. Wade believed he physically saw Freeman that morning, but specifically denied that he and Lewis saw Freeman during these events or spoke to her together. He did not recall having learned that she had been terminated at that time.

Schoppman testified that after Freeman left her office, she left the office and came on Freeman talking loudly to Lewis and Wade in the Hall. Schoppman escorted Freeman to the exit and returned to her office at which time she heard the Code Blue announced. At this time she retraced her steps and continued on to the patient's room. She then had an encounter with another unrelated patient which required her to take him to the lobby and then go to the cafeteria with the intention of obtaining a cup of coffee for the latter patient. At the cafeteria door she observed Lewis and Wade at the back door. She testified:

⁸The code and the subsequent events are relevant to and discussed in the portion of this decision dealing with the termination of Wade.

⁹ A "Code Blue" or "code" is a designation for an emergency situation in which a patient is determined to be at immediate risk of death and requires immediate cardiopulmonary resuscitation or other immediate care. Such an announcement, in effect, summons all

health care employees and special medical equipment to the patient's side in an effort to sustain the patient's life.

¹⁰ Although the record identified the patient by name and other circumstance, in the interests of privacy he will be referred to here only as the patient.

Well, I saw them going toward the back door and I looked at my watch, and I knew there was a code going on, and I was pretty upset that I had a person that I knew was a daytime employee that was walking out the back door and I said, ''Michael, where are you going? You know, it's 7:15 in the morning, is this the time you normally take a break? And we have an emergency going on.'' And he turned around and said something to me—"I'm getting report." I said, "Well, that's not important right now. The care of the patient is important. We have an emergency going on; you need to return to the unit."

Q: And what did he do or what did he say? A: "Okay."

Schoppman testified she was in and out of the area dealing with various matters over a course of time and observed Wade in the area outside the patient's room looking at charts and thereafter in the patient's room.

The patient could not be resuscitated and died during the course of the code. There was no suggestion by any party that care of the patient was inadequate or that the respiratory therapy portion of his care during the code was wanting.

Shortly after these events, Schoppman went to the office of Karen Hoffman, the supervisor of the respiratory department. Schoppman testified she told Hoffman she had a concern that a respiratory therapist, Michael Wade, was not on the clinical unit during a code and asked that the situation be investigated. Hoffman thereafter on several occasions reported to Schoppman. Her initial report confirmed the fact that the coding patient had been assigned to Wade. Schoppman asked that, after the emergency had calmed down, Wade and Hoffman meet with her in the office.

That meeting occurred soon thereafter. In the meeting Schoppman testified that she asked Wade what had happened given that she had seen him walking down the hallway during the code. Schoppman testified that from her perspective Wade did not seem to understand the gravity of the situation and she asked if he realized the coding patient was his. She recalled that Wade was initially evasive and inconsistent on the question, but conceded that, in fact, the patient was his. Schoppman told Wade that it was his responsibility to take care of his patients. At this point Karen Hoffman, in Schoppman's recollection, asked Wade—"Are you aware of the policy; that's your responsibility to manage the code." His response was to ask if he needed an advocate. At this point Schoppman told Wade she needed to investigate the matter further and that he was suspended for 3 days. Hoffman's recollection of the meeting was less clear, but essentially corroborative of Schoppman.

Wade recalled the meeting similarly with several differences. First he recalled that he was accused of "compromising" patient care during the code, but on his inquiry for specifics was never told just what aspect of the code policy or other rule he had broken. He further recalled that he told Schoppman that he would prepare a written account and give it to her on his return from the suspension.

After the meeting, Schoppman testified that during her investigation of the incident she spoke to the nursing supervisor on the code, Nancy Sagaral, Respiratory Therapist Supervisor Karen Hoffman, and Respiratory Therapists Marcelino Guttierez, Bobby Ladesma, Darcy Adams, Bob

Neal, and Zo Beligan. Thereafter she prepared a memorandum dated June 16 to Diane Ashby, head of the respiratory department, concerning the events. Schoppman testified she recited her investigatory observations in the memo noting that she left her office to go to the code, became involved with a patient, observed the code in progress in room 36 and thereafter observed Wade and Lewis walking down the hall. She noted that she asked Wade if it was normal to take break at the beginning of the shift and when he demurred, told him there was a code in progress and that he should take care of the patients in the units that needed it. He responded that he was getting report and Schoppman told him the priority was the code and patients' care needs and that he should return to work.

Schoppman's memorandum asserts that after learning that the coding patient was Wade's she had four immediate concerns respecting Wade: (1) His failure to respond to a code on his patient; (2) leaving the other patients uncovered while two or three of his peers were at the code; (3) leisurely walking off the unit during a code, casually talking to another employee; and (4) validity of his response of "getting report" when confronted by me.

The memorandum recites additional facts derived from Schoppman's asserted investigation of the events through interviews with seven staff and a call to the home of Tal Lewis. The memo recites as the final of many bulleted "facts":

All of the therapists were able to relate the department policy regarding responding to codes and responsibility of the therapist to his patient. All five therapists stated that the protocol was for all the therapists to respond to the code, and then the therapist who is assigned the patient is to take charge and remain with the patient. The other therapists return to their assignments as soon as possible.

The memo concludes with a recitation of "My Questions/ Concerns." The three concerns listed were: (1) Where Wade was at the time of the code. (2) Why Wade did not stay at the code since it was his patient. (3) What was so important that Michael (Wade) had to talk to Tal (Lewis) about instead of taking care of his patient.

Schoppman and Ashby first discussed Schoppman's June 16 memo on June 16 or 17, 1994. Ashby testified she investigated the matter including interviews with all of the therapists on duty and telephoned Schoppman at her home on Saturday June 18. Schoppman recalled the conversation:

[Ashby] contacted me at home, by phone, and told me the respiratory therapists that she had interviewed, and that she concluded that their knowledge of the policy was the same as my investigation and that they all were aware of what the policy was.

She also stated that she had not gotten a hold of Tal [Lewis] by that time, and that she had talked to everyone and her evaluation of where Michael Wade was that he was definitely out of the Report Room. He had left the Report Room by the time that the code had been called. Her response was that she agreed that this was serious and that Michael Wade should have responded to the code; that it was his patient, and that because of the previous series of events and because of

the seriousness of the event, she recommended termination.

Ashby met with Schoppman in her office on the morning of Monday, June 20. Ashby told Schoppman she had spoken to Tal Lewis since they had last talked and that his version of events mirrored Wade's.

Schoppman testified she prepared a memorandum on Wade to Regional Director Turner on June 18 dated that day. The memorandum describes May and June warnings and conferences, his not staying with his assigned coding patient, doubts about the veracity of Wade's assertion he continued to receive report during the code, and his attitude during the event. The memo recommends Wade's termination.

Ashby prepared a memorandum to Schoppman dated June 21 which was given to Schoppman, by her testimony, on the morning of June 21. The memo recited various factual assertions respecting the June 16 events and concluded:

In response to your concerns regarding Michael [Wade's] whereabouts when the code was called and his failure to stay with his patient:

It is the responsibility of the therapist assigned to the patient to remain with the patient in a code situation.

. . . .

I find Michael's behavior unacceptable. As a member of this department for the last 1 1/2 years, he is well aware of our stated protocol during codes. He also knows that the assignment is posted. His response or his lack of to his patients is very distressing. This is not the type of image that I want projected by members of my department.

After reviewing the information given to me and after conducting interviews myself regarding the incident, it is my decision to terminate Michael Wade immediately.

Michael Wade met with Ashby and Schoppman on June 21. Wade produced a written report of events on June 16 describing events much as he testified as set forth above. Schoppman testified about the remainder of the meeting:

We reviewed the document with Michael Wade. Diane Ashby then had the counseling form in front of her and basically went over the results of the investigation as to how we had arrived at our decision to terminate Michael Wade. . . . And then I talked to Michael and gave him the—I talked about—I recited all that's happened. My concern was that the patient—he did not respond appropriately to the code and I wanted him to understand completely why he was being terminated. He did make a statement that he didn't agree, and I gave him the form; he did sign it; I gave him his check and then he left.

Ashby testified that she read Wade's factual report, doubted his veracity and, further found no ameliorating facts in his recitation which would excuse his not staying with his patient. After reading the paper she gave Wade his termination papers. Wade recalled that Ashby and Schoppman gave his report but a cursory review and then asserted their investigation showed he had compromised patient case, but they were

not specific about the matter and simply processed the termination.

A conference report was filled out at the meeting reciting the fact of Wade's termination for failure to comply with department protocols in a patient emergency. The sheet, inter alia, noted the code, the obligation of a respiratory therapist assigned to a coding patient to stay with that patient and Wade's failure to do so on June 16. Wade stood on his report of events and incorporated them into the conference report under employee comments.

Wade and Lewis testified respecting the practices involved in dealing with a coding patient assigned to a particular respiratory therapist. Wade testified it was his experience, both at other facilities and at the Hospital, that there is no obligation on the part of the assigned respiratory therapist to physically stay with the coding patient if all respiratory therapist treatment was being performed by other respiratory therapists who had arrived on scene before the arrival of the assigned therapist. In any given circumstance the assigned physical therapist might join or replace another physical therapist in the treatment of the coding patient, check on the patients of the therapists handling the code or undertake other necessary tasks other than those involving the coding patient. Lewis corroborated Wade's testimony respecting hospital practice concerning coding patients and suggested that in his experience at the Hospital circumstances in which the assigned physical therapist did not remain with the coding patient were commonplace. Althea Bogle-Lewis also testified that it was not a violation of hospital policy for a respiratory therapist to undertake duties apart from his or her assigned coding patient if that patient was receiving satisfactory care from other respiratory therapists.

A written hospital policy titled "Cardiopulmonary Resuscitation" containing department of nursing guidelines for the initiation of emergency measures by the department of nursing in code blue circumstances, revised in September 1992, describes the appropriate response team which includes two respiratory therapists, but does not assert that any assigned respiratory therapist shall remain with a coding patient. A second written hospital policy titled "Cardiopulmonary Resuscitation" similar in format to the earlier described policy, but labeled multidisciplinary and marked as revised in October 1993 and April 1994, specifically asserts that in code blue situations: "The Respiratory Therapist assigned to the coding patient will stay with the patient."

Schoppman and Ashby testified that they were familiar with the latter policy and that it was in effect as of the revision date it bore. They asserted the policy was posted on a bulletin board in the respiratory therapy department as well as in a "memo book" kept in the department. Schoppman testified that the policy as well as all other current policies is maintained in a policy and procedure manual in the respiratory therapy department and in the administrative office. While Wade and Lewis and Bogle-Lewis did not dispute the existence and maintenance of policies and protocols generally as indicated by Schoppman and Ashby, they testified that they were not aware of and had simply not seen the later policy in the locations noted and believed that in fact it had not been on file or in effect. Rather the three testified the earlier quoted policy without the requirement that an assigned respiratory therapist remain with the patient was in place and controlling at all relevant times.

Schoppman and Ashby not only asserted the "stay with the patient" policy was implemented and publicized before the events in issue, they also testified that they were not aware of the policy being violated save in the instant instance. Karen Hoffman corroborated their testimony respecting the existence of the policy at relevant times, the fact that it was followed to her knowledge and the final fact that she was unaware of any failure by respiratory therapists to follow the policy save for Wade during the events in contention.

d. Allegations respecting Verona Steen

Delanor Manson, assistant administrator for clinical operations, testified that she commenced employment at the Hospital on July 4, 1994, and within a few weeks received complaints from Donna Bailey, director of nursing, that Verona Steen, a night licensed vocational nurse, was not a team player and was intimidating and hostile. Manson also testified that Isaac Saroic, a nursing supervisor, complained to her that Steen intimidated nurses by refusing work assignments, complaining of overly heavy assignments, and "cutting her eyes" at them. Manson took no action respecting these matters because Steen's file contained no record of such difficulties and the allegations had not been adequately documented in her view. She expressed her desire to the complaining parties that such documentation be maintained in future and did not raise the matter with Steen.

Bailey came to Manson in early August. She said that she felt that something needed to be done concerning Steen, but told Manson she was leaving and she had a lot of things she needed to do and requested Manson "take care of this situation." Manson requested a memo on the matter. Bailey prepared the requested memo which took the form of an inter-office memo from Donna Bailey, director of nursing, to Delanor Manson, assistant administrator of clinical operations, dated August 10, 1994, respecting Verona Steen, LVN. The memo asserted in part:

On the morning of August 3, 1994, I was met by Wanda McCowns, Monitor Tech for the Central Wing. She was very upset about the attitude of her co-worker Verona Steen, LVN. This was the night it was discovered that there was no house physician available (a mix-up had occurred in the schedule, and the problem was rectified as soon as Dr. Gipe was notified).

Wanda stated that when the problem surfaced, Verona made the comment, "Well, wouldn't the state like to find this out." Wanda stated that Verona is very "negative" about Vencor, always making threats to go to the Labor Board or the State when anything out of the ordinary happens. Wanda feels this creates a very stressful environment for her and her team members as the workload is heavy enough without the added stress of having to deal with someone's negative attitude.

In addition to this issue with Verona, she has a history of complaining about her assignment at the beginning of the shift. See attached documentation from Isaac Saroic, relief house supervisor.

My main concern is the impact of Verona's negative attitude toward Vencor as an organization can have on the entire night shift, which in turn, may affect patient care. . . .

. . . .

I am bringing this matter to you[r] attention knowing that you will deal with it in the proper manner. If I can be of assistance or should you need more information, please let me know.

Attached to the memo was an action request prepared by Registered Nurse Saroic and sent to the director of nursing dated August 3, 1994, on it Saroic noted, inter alia, that Steen was "complaining about assignments" and asking about her patient load as compared to others and had "Demanded incident report form."

Delanor Manson testified that after receiving the memo she again talked with Bailey and considered the memo. She contacted Roxanne Cohen, the assistant director of nursing, showed her the memorandum from Bailey, and asked her to talk to the persons involved. Cohen reported to Manson a few days later that she had spoken with nursing supervisors, RNs, monitor techs; that they were intimidated by Verona Steen; that they were afraid of her; and that Steen refused to take assignments.

Manson testified she then read Steen's personnel file for evidence that Steen had not been a "team player" in the past, but found little evidence of that fact.¹¹ She testified:

I decided that I needed to talk with her regarding the complaints, because I was focused on team players and customer service, and I wanted everyone to participate as a team player, and I thought this was an opportunity to discuss that. [I] asked Roxanne [Cohen] to do a counseling form or a coaching session and schedule a time when Verona Steen could come in and talk with us.

Steen met with Cohen and Manson on August 19 in Manson's office. The meeting was described by both Steen and Manson. Steen recalled that she was called to the office without any expectation or prior notice of the problems she would be told of. She met with Cohen and Manson. Cohen told her that there had been several complaints about her attitude and that Cohen was quite concerned about it. Steen pressed Cohen for specifics respecting her attitude and for the names of those who complained and circumstances of the complaints. Cohen told her that her attitude caused a stressful environment for other employees, but that she did not intend to name them to her.

Manson recalled that she and Cohen emphasized being a team player and having a positive attitude and referred to the hospital personnel manual in these regards. She further recalled discussing Steen's use of intimidating body language and apparent lack of willingness to take assignments, but that Steen repeatedly questioned the meaning and lack of specificity of their comments and complaints desiring particular events and circumstances and the names of complainants. Manson testified neither she nor Cohen were prepared to supply such specifics to Steen.

A written record of employee conference was given to Steen. The form under "Reason for Conference" notes "Written Warning #1" and asserts as the "reason for conference": "Non compliance with hospital policy and procedure. Negative uncooperative attitude failure to work as a

¹¹ Steen testified that she had never been issued a warning here-tofore and had been awarded prizes for laudatory conduct.

team player." In the space for "Relevant facts and events" appears the following:

Reports from coworkers, complains about assignments, not following chain of command. Does not demonstrate a sincere commitment to the company by negative attitude. Creates a stressful environment for coworkers. Is not a team player.

The report further indicates that, if Steen was unable to fulfill expectations, "further disciplinary action will result up to and including termination." Steen's responding comments on the report complain of a lack of specificity in the matters complained of, the unnamed complainants and hearsay nature of the reports, and the defamatory nature of the accusations. No further adverse action has since been taken against Steen.

D. Analysis and Conclusions

1. Conduct alleged to violate Section 8(a)(1) of the Act

a. The allegations respecting Steve Turner

The testimony of Michael Wade respecting his conversations with Steve Turner was unchallenged by Turner who did not testify. I found Wade's testimony in this regard plausible and I credit it in full. The Respondent argues on brief that the testimony of Wade on cross-examination respecting whether or not Turner told Wade that he had him pegged as a "union leader," set forth supra, suggests that Wade was told no more by Turner than that he had been pegged as "a kind of leader around here." The examination leaves some room for doubt, but given the absence of any opposing testimony on the question, the credible demeanor of Lewis during this recitation, the initial answer of Wade and his further reaffirmation that the term "union leader" was used by Turner, I am convinced that the General Counsel has met his burden of proof of showing that Turner told Wade he had him pegged both as a "union leader" and as "kind of a leader."

Regional Director Turner is a high official of the Hospital. He summoned Wade to his office on or about April 29, 1994, and there, in the locus of highest hospital managerial authority, asked Wade: "What is this about a union?" Turner also told Wade: "Well, I hear that the people are getting a union together and I want to know what is it that the people want." He told Wade: "We have you pegged kind of as a union leader around here."

Given Turner's statements, it is clear that the Respondent, through Turner, violated Section 8(a)(1) of the Act as alleged in paragraph 6 of the complaint, by interrogating Wade respecting his union activities and /or sympathies and by creating the impression of surveillance of Wade's union activities and/or sympathies. I so find and therefore sustain paragraph 6 of the complaint.¹²

b. The allegations respecting Diane Ashby

Complaint paragraph 7 alleges that Diane Ashby on or about April 29, by telephone from the facility, interrogated

an employee concerning all the employees' union activities and/or sympathies and directed the employees to cease union organizing activities. Wade testified that Ashby called him at home and told him: "Well, Michael, you know, you shouldn't be with the Union. She started telling me about the anti stuff." Ashby strongly denied that the conversation ever took place.

Wade places the date of the call as occurring soon after the Hospital realized the Union was organizing and on the same day he was summoned to Turner's office. It is not without plausibility that, after a high management official summons and interrogates an employee who is a perceived union leader in such a context, the employee would receive a telephone call at his home from a lower management official admonishing him for being "with the Union." In light of the clear recollection of Wade countered by the categorical denials of Ashby, the conflict requires a resolution of credibility in the context of the burden of proof that the General Counsel bears. Based on the relative demeanor of the two witnesses during this portion of their testimony informed by the two's entire testimony and the record as a whole, I credit the testimony of Wade over the denial of Ashby respecting the assertions noted. I find, even given the General Counsel's burden, that Wade was testifying truthfully respecting the telephone call on April 29, that he had a clear memory of what was said in the call, and that he would be unlikely to have been mistaken respecting the identity of the person with whom he was speaking. I discredit Ashby's denial based on her inferior demeanor during her testimony.

The Respondent argues that the call, even if Wade be fully credited, contained no specific assertions of retaliation or other threats or promises of benefit and therefore should not be held violative of the Act citing Rossmore House, 269 NLRB 1176 (1984). Rossmore instructs that statements must be viewed in their context and circumstances. Here the director of respiratory therapy, Wade's superior, called him at his home and told him he "shouldn't be with the union" following the assertion with "anti stuff." Such a call from such an official contains its own implied threats and promises of benefit and without a saving context¹³ impliedly directs Wade to cease union activities. By such conduct, the Respondent inevitably chills employee's Section 7 rights to engage in union activities and, in so doing, violates Section 8((a)(1) of the Act. I so find and, to that extent sustain, the General Counsel's complaint paragraph 7.

c. The allegations respecting Billie Ann Schoppman

Complaint paragraph 8 at subparagraph (a) alleges that on or about May 12, Schoppman interrogated an employee concerning the employee's union organizing activities and at subparagraph (b) alleges that Schoppman told an employee that selection of a union would prevent employees from discussing their problems with management. Each action is alleged to violate Section 8(a)(1) of the Act.

¹² The Respondent on brief at p. 72–73 argues on brief that Turner neither improperly solicited grievances from Wade nor improperly threatened him. The complaint does not allege these violations of the Act.

¹³ Indeed given Wade's credited recollection that the telephone call occurred on the same day that Turner called him into the office, the timing is adverse to the Respondent's argument that the telephone call was essentially ambiguous and benign.

(1) Complaint paragraph 8(a)

There is no doubt that a conversation occurred between Schoppman and Freeman on May 13. Freeman testified, as set forth in greater detail supra, that Schoppman asserted, in the context of a discussion that had turned to the Union, that there were a handful of militants who were out to destroy Vencor. Freeman responded in one version that she did not consider herself a "militant," in another that she did not consider herself the Union. Freeman testified that Schoppman then "wanted to know if I was for Vencor." Schoppman's version of the event is similar save that she did not recall using the term "militants." Further she denied asking Freeman how she felt about the Union or about her union activities. She did recall Freeman saying she was for "what was right at the [H]ospital."

The conversation as described by Freeman immediately above is essentially consistent with Schoppman's recollection and is credited. I also credit Freeman over Schoppman respecting the ''militant'' reference inasmuch as Freeman recalled not only Schoppman's use of the word, but her own adoption of the term in her responding denial. I found Freeman's demeanor convincing and believe she testified honestly to her memory of the conversation and would have been unlikely to have misrecalled this detail. Schoppman has in my view simply forgotten her use of the term. In the recollection of a lengthy conversation, it is not unusual for one witness to recall specifics that the other participant does not recall.

The remaining substantive issue is whether or not the question by Schoppman to Freeman of whether or not she was "for Vencor" in the special context and circumstances presented here, rises to the level of an unlawful interrogation respecting Freeman's union organizing activities. Clearly, if Schoppman had asked Freeman if she were a union militant trying to destroy the Hospital or had asked, in the context of a conversation dealing with a union or unions, whether or not Freeman was a militant trying to destroy the Hospital, the question would have clearly called for an answer by Freeman about her union organizing activities and would therefore be in violation of the Act.

Schoppman's actual interrogatory was one step removed from the hypothetical questions framed immediately above, i.e., she asked if Freeman was "for Vencor." Standing alone this question would not violate the Act. I find, however, that the question as posed in the larger context of the statements about union militants trying to destroy Vencor was intended by the interrogator and was reasonably perceived by the interrogatee to call for a response sounding in Freeman's activities and sympathies on behalf of, or in support of, the Union. 14 In the context of the conversation no other meaning or intention is fairly possible. Given this, I find that Schoppman's question is no different in fact or in law than the same question in plainer language: Are you supporting a

union which is out to destroy the Hospital or are you supporting the Hospital?

Given this initial resolution it is necessary to consider the Board's teachings in *Rossmore House*, 269 NLRB 1176 (1984), enfd. sub nom. *Hotel & Restaurant Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). In that case, the Board held that the circumstances surrounding an alleged interrogation and the reality of the workplace must be considered and that an employer's questioning of open and active union supporters about their union sentiments in the absence of threats or promises does not necessarily interfere with, restrain, or coerce employees in violation of Section 8(a)(1) of the Act.

In this context it is also necessary to consider the Board's decision in Manor West, Inc., 311 NLRB 655 (1993), cited by the Respondent on brief. In Manor West an employee went to a supervisor's office and discussed an incident occurring the previous night. The employee was asked about the problem and responded, inter alia, that employees were talking about starting a union and that the employee had also been approached about starting a union. At that point in the conversation the supervisor asked the employee how he felt about a union. The Board panel, Member Devaney dissenting, reversed the judge and held that, since it appeared that the employer had no prior knowledge of the employee's union activities, had not engaged in any unlawful conduct, and the employee had initiated the conversation and volunteered the information about the Union as well as the fact that the employee answered the question honestly and the conversation was otherwise free of threats, promises, or other coercive activity, the interrogation did not violate the Act.

In the instant case Freeman clearly initiated the physical meeting and general conversation with Schoppman at issue by coming to her office. While the initial subject of the conversation was a particular supervisor, Freeman testified without contradiction that Schoppman brought up the subject of the union campaign. Further, there is no question that Schoppman was aware of the ongoing union activities of employees. Also important to considering the entire context of the conversation, Schoppman was not simply making neutral or curious inquiry. Rather she clearly expressed her animosity toward those few employees "out to destroy Vencor" and in that context asked Freeman about her sympathies.

Considering all the above, I find that the contextual analysis set forth in *Rossmore, Manor West, Inc.*, and other Board cases does not so discount the force of the interrogation at issue here so as to render it not violative of the Act. Rather I find that the interrogation was initiated by Schoppman without a saving context and reasonably chilled Freeman's Section 7 rights in violation of Section 8(a)(1) of the Act as alleged in complaint paragraph 8(a). I therefore sustain the allegation in its entirety.

(2) Complaint paragraph 8(b)

Freeman testified, as set forth in greater detail supra, that near the end of her mid-May conversation with Administrator Schoppman, the following exchange occurred:

[Ms. Schoppman] said, she told me, "Well, you know, Viviana, if the Union comes in you will not be able to come in here and talk with me the way you're talking

¹⁴ Indeed as the credited testimony of Bogle-Lewis indicates and the Hospital essentially does not dispute, the Hospital had embarked on an election campaign that included management and supervisorial estimations of individual employee's support for the Union which estimations were to be based in part on conversations with employees

to me." And I told her, "Yes, I would. Even though I'd have a representative."

Freeman recalled the exchange a second time in her testimony.

Well, you know, Viviana, you won't be able to call—make an appointment to just come in—in other words, the way I took it was—'just like you coming in here to talk to me, if the Union was in here then you'd have to go through your representative and they would be the one talking." I, in turn, told her, "Oh, they may be in here with me but I will be talking for myself."

Schoppman did not directly contest Freeman's recollection of this exchange.

The Board in Ben Venue Laboratories, 317 NLRB 900 (1995), a case cited by the Respondent on brief, held that the existence of a Section 9 representative with the legal requirements for providing for such a representative's participation in matters relating to terms and conditions of employment has implications for an underrepresented employer's procedures for dealing with employees, and that employers may inform employees about the effects that 9(a) representation would have on their policies without being obligated to give employees a detailed and precise explanation of the changes which would be wrought by Section 9 representation. More specifically, the Board held that an employer statement to employees in an election campaign context that, if the Union came in, there would no longer be an open door policy, was "lawful and accurately reflected the effect that 9(a) representation would have on the Respondent's policy." (317 NLRB 900 at 900.) The Board reversing the judge on the issue found no violation of the Act.

I find Schoppman's remarks under challenge herein indistinguishable from those found permissible in *Ben Venue Laboratories*. Accordingly, I find that the General Counsel has failed to sustain the allegation of paragraph 8(b) of the complaint and it shall be dismissed.

2. Conduct alleged to violate Section 8(a)(3) of the Act

a. The allegations respecting Freeman

Complaint paragraph 9 alleges that the Respondent discharged Viviana Freeman on or about June 16, 1994, and the complaint further alleges that the Respondent did so because of the employee's union and/or other protected concerted activities in violation of Section 8(a)(3) and (1) of the Act. Less abstractly, the General Counsel and the Charging Party contend that when the Respondent learned that Freeman was seeking time off and that she might be terminating her employment, it imagined an as yet nonexistent resignation, accepted it, and paid Freeman off to avoid her continuing employment and likely prounion vote in the July 15 election. The Respondent to the contrary contends that confronted with Freeman's request for time off and contemplated resignation, it simply undertook on a purely business decision to place an immediately available employee in Freeman's position and pay her in lieu of notice.

(1) Resolution of conflicting evidence

(a) Knowledge of union activities

The Respondent's agents' knowledge of employees', including Freeman's, union activities was in substantial dispute during the litigation. The General Counsel and the Charging Party argue that employees were well known to the Respondent's agents as union supporters: (1) by virtue of their outspoken support for the Union or lack of support and sympathy for the Hospital at management conducted employee meetings, (2) by virtue of their attendance with the Union at the putative May 18 National Labor Relations Board representation hearing, (3) by virtue of their names appearing on supervisor prepared tally lists as union supporters and, finally, (4) by virtue of conversations with, or statements by the Respondent's agents on the subject. They further argue that the Respondent, from the moment it had knowledge of the employees' organizing efforts, made it clear to its managerial and supervisory staff that a critical part of its antiunion campaign was an ongoing investigation and identification by the Respondent's agents of employees' union sentiments and how each employee would vote in the upcoming union elections. In such a setting, argue the Charging Party and the General Counsel, it is absurd to believe that the Respondent's agents did not take an operative fact that certain employees, including Freeman, were union supporters who would proselytize other employees as well as vote for the

The Respondent seeks to discount the testimony of Bogle-Lewis respecting the extent of the Respondent's knowledge of and hostility to employee union supporters expressed at management meetings during the union campaign. Further, Schoppman testified that she simply did not hold a confident opinion respecting Freeman's union sentiments or voting intentions at any relevant time.

I find there is little question that Freeman was a strong union supporter and that by June her support was well known at the facility. Roxanne Cohen, nursing supervisor until her promotion to assistant director of nursing, testified that at least by June 9 she knew that Freeman was actively involved in supporting the Union. Although the Respondent skillfully identifies inconsistencies in the testimony, notes and statement of Bogle-Lewis, based on her very convincing demeanor, I find her testimony of what occurred at management meetings respecting the union campaign believable and credit it in its entirety. Thus, I find that the fact of employee attendance at the representation hearing on May 13 was viewed as conclusive evidence of support for the Union by management and that the employee attendees, including Freeman, were explicitly noted as union supporters.

I further find that Schoppman was in fact convinced by June that Freeman was a union supporter and a vote for the Union in the election. I base this in part on my earlier findings that Freeman was a known union supporter. Further however, I discredit Schoppman's testimony that she had no particular view of Freeman's union sentiments based on demeanor grounds. Schoppman's testimony in these regards simply created in me the impression that, since it is a philosopher's truism that one can never know for certain the subjective opinions of another, it was permissible for her to

assert she did not know, suspect, or assume Freeman's or certain other employees' views or sentiments respecting the Union. I simply have no doubt that Schoppman was a strong supporter of the Hospital's union campaign which included the instruction to supervisors and managers to become aware and pass on to higher management the union sentiments of employees. Schoppman's active participation in the process makes it essentially impossible that Freeman's sentiments were not reported to her and, further, that she would not have been aware of them in taking the actions at issue here.

(b) Antiunion sentiment

I have found, supra, that Regional Director Turner told an employee that the owner would not "take too kindly" to employees bringing a union to the Hospital. I have also credited the testimony of Bogle-Lewis, set forth above, respecting the hostility of the Respondent's agents to employees who supported the Union. Thus, I find that Assistant Administrator Ames told other supervisors that they needed to pay special attention to monitor the Union supporting employee's work performance. She also asserted: "We need to get them out of here. They do not belong here at Vencor; those employees do not belong here at Vencor because they do not support Vencor." So, too, I have credited the testimony of Freeman that Schoppman on May 13 told her that there "were a handful of militants that were out to destroy Vencor."

Based on all the above and the record as a whole, I find in agreement with the arguments of the General Counsel and the Charging Party that the Respondent's highest officials and managers were strongly opposed to the union organizing its employees and viewed employees assisting the Union in this regard as disloyal employees bent on destroying the Hospital who should be monitored and gotten rid of.

(c) Testimonial disputes respecting the events relevant to Freeman

Several areas of dispute run through the events relevant to Freeman. Schoppman testified that in their May 13 conversation Freeman told her she was quitting at the end of July but wanted to go through what Schoppman understood to be the union vote first. Freeman denied she had stated more than that she was contemplating quitting at some unspecified future date.

Roxanne Cohen recalled that at her June 9 meeting with Freeman, she commented to Freeman that she would not be at the facility for the election and that Freeman responded: "[S]he kind of laughed and said it doesn't matter because I'm going to quit by the end of July anyway, so I won't be here." Cohen made a similar report of Freeman's statement that she would be quitting at the end of July on Freeman's June 9 request for vacation/leave of absence form. Freeman, to the contrary, testified that when Cohen told her that she would not be at the Hospital for the union election she responded she "would definitely be back in time for the election."

I credit Schoppman over Freeman respecting her announcement of a July quit date during their conversation on May 13. I make the resolution in part based on demeanor, but primarily on the fact that thereafter the word was put about the facility that Freeman was leaving and, as Freeman asserted, that information about her resignation could only

have come from Schoppman. Were only a vague indication of a future intention to quite without any time given, it is unlikely Schoppman would have passed on the fact of Freeman's quitting to other employees as Freeman testified she believed Schoppman had done.

Similarly, I credit Cohen over Freeman that Freeman told Cohen in June that she was going to be leaving at the end of July. I do not believe that Cohen would have so reported this assertion to Schoppman and recorded it on the form, as noted supra, without Freeman having made the statement. I simply believe that Freeman has forgotten what she said regarding the date of her intended quit. I reverse myself however and credit Freeman over Cohen respecting their testimonial conflict over whether Freeman said she would be back in time for the election or laughed and said that it did not matter since she was quitting. It is quite clear based on the entire testimony respecting Freeman that she strongly desired to return for and participate in the vote. This is consistent with Freeman's May 13 statement to Schoppman as recalled by Schoppman. It is implausible that Freeman would have expressed humorous indifference to the union election as Cohen asserts. The recollection of Cohen to the contrary is specifically discredited.

(2) Findings and conclusions respecting Viviana Freeman

I found that Freeman did in fact inform Schoppman in May that she was considering quitting in July. I further found that on June 9, Freeman told her supervisor, Cohen, that she was requesting time off in the first part of July, but in response to Cohen's comment that she would miss the election indicated to the contrary that she would be back for the election, but would be quitting at the end of July.

In response to this, and knowing full well that Freeman was an active union supporter and that the Hospital and its management team were vigorously contesting the Union's attempts to represent hospital employees, Cohen went to Schoppman and reported the conversation she had just had with Freeman. Schoppman directed Cohen to put the request through normal channels but considered or, as she later told Freeman, researched the matter. She determined to end Freeman's employment relationship with the Hospital and did so by construing Freeman's statement to Cohen as a "verbal resignation" which she accepted on May 13, paying Freeman in lieu of notice and seeing her off the premises.

As noted supra, the General Counsel and the Charging Party allege that the Respondent's construal of Freeman's statement of a future intention to quit as an immediate verbal resignation and its acceptance in mid-June 1994 was a ruse, pretext, or device to rid the Hospital of a union supporter and a prounion vote in the July 15 election. The Respondent asserts that its decision was simply one based on personnel requirements and the fact that a particular individual was available to fill the spot that would be created by the Freeman departure.

The Board in *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), established a test for approaching discrimination allegations which was recently restated in *Manno Electric*, 321 NLRB 278, 280 fn. 12 (1996):

Under [the *Wright Line*] test, the Board has always first required the General Counsel to persuade that antiunion sentiment was a substantial or motivating factor in the challenged employer decision. The burden of persuasion then shifts to the employer to prove its affirmative defense that it would have taken the same action even if the employees had not engaged in protected activity. *Office of Workers Compensation Programs v. Greenwich Collieries*, [114 S.Ct. 2551, 2557–2558 (1994)], at 2258.

That test will be applied here.

Turning to the General Counsel's case with respect to which he bears the initial burden of persuasion, the General Counsel and the Charging Party have established and I have found that the Respondent including its decision making agent in this matter, Schoppman, was actively involved in opposing the Union's election campaign, regarded union supporting employees as disloyal and worthy of removal and had violated the Act in talking to employees including Freeman about the Union. They have also established that the Respondent, including Schoppman, well knew of Freeman's active support for the Union and thus the essential certainty that her vote would be for the Union.

The General Counsel and the Charging Party have further established and I have found that the Respondent, without ever discussing the matter with Freeman, construed her May and June statements about an intention to leave the Hospital at the end of July as a resignation, the acceptance of which was announced to Freeman as effective immediately. Thus in a surprise interview, Freeman's employment relationship with the Hospital was severed over her protests and she was ultimately directed to leave the facility.

I find based on the above recited findings as well as the record as a whole that the General Counsel has easily met his initial burden of persuasion that antiunion sentiment was a substantial and motivating force in the Respondent's decision to terminate Freeman's employ on June 16. Under Wright Line it is therefore appropriate to examine the Respondent's affirmative defense that it would have terminated Freeman as it did even if she had not been identified as a union supporter and presumed vote in favor of the Union in the upcoming NLRB election. As to this defense the Respondent bears the burden of persuasion.

The Respondent ably marshals the argument that the Hospital, faced with an employee who announced an intention to take the first half of July off and to quit at the end of July, took the prudent personnel decision to accept the employee's resignation¹⁵ and, with pay in lieu of notice, immediately end the employee's employment so that another individual, who was available, desired full-time employment and who would well serve the employer's needs, could be placed immediately into the position. And, as noted by the Respondent, mere suspicion that union activity was a contributing cause of the termination decision is insufficient to support a finding of a violation of Section 8(a)(3) of the Act citing *Raysel-Ide, Inc.*, 284 NLRB 879 (1987).

The chain of events dealing with Freeman's termination were unusual and procedurally out of the ordinary for the

Hospital. I find the Respondent's arguments and explanations of how the events could have occurred without antiunion motivation informing the Hospital's decisionmakers not implausible and, absent the credibility resolutions made respecting Schoppman and Cohen in their dealings with Freeman, might well be persuasive. The Respondent's arguments respecting this element of the complaint however are overwhelmed by two sets of findings. First, I have found that Cohen, who admittedly knew Freeman was an active union supporter, raised the relationship of the union election date and her time off with Freeman and that Freeman made it clear that she would be back for the vote. Freeman testified she went to Schoppman and related the conversation she had just had with Freeman. I specifically find, based on the demeanor of the witnesses, the entire record, and the probability of events, that Cohen told Schoppman what was told to her including Freeman's statement that she intended to return for the vote.

Second, I have discredited Schoppman's testimony respecting her estimations of various employees' support for the Union, including her statement that she had no opinion or belief respecting Freeman's union preferences or voting intentions. Equally on demeanor and probability grounds, as set forth supra, I have discredited this testimony and found that Schoppman well knew in mid-June that Freeman was a union supporter and a vote for the Union should she be eligible to cast a ballot in the July 15 election.

Having discredited Schoppman's repeated denials that she did not have knowledge of Freeman's union sympathies at relevant times, it is a permissible step, which I explicitly take on this record, to also reject her testimony that her decision to proactively terminate Freeman was not based on Freeman's union support or potential prounion vote. Based on the record as a whole, I find that the Respondent's hostility to Freeman's union sympathies and voting intentions was a substantial and motivating factor in the decision to terminate her when it did. While not inherently implausible, I find Schoppman's asserted rationale for accelerating Freeman's departure was a post hoc rationale designed to conceal her true motive for the action: i.e., achieving the more important goal of ending Freeman's employee status at the Hospital and sending her on her way, thus stopping her on site support for the Union and rendering her ineligible to vote in the election.

Given all the above, I find the Respondent has failed to sustain its affirmative defense to Freeman's termination. I further find that, in terminating Freeman on June 16, 1994, the Respondent violated Section 8(a)(3) and (1) of the Act. I therefore sustain this allegation of the complaint.

b. The allegations respecting Verona Steen

Based on the credibility resolutions set forth supra, I find that Steen was labeled as the instigator of union organizing activities at the Hospital by Donna Bailey, director of nurses, to other management in April and further identified as a union supported through her attendance at the putative Board representation hearing on May 18. Steen was one of the employees mentioned in the May 19 meeting of management and supervisors for monitoring as a disloyal union supporter about whom Ames asserted: "We need to get them out of here. They do not belong here at Vencor; those employees do not belong here at Vencor because they do not support Vencor."

¹⁵ As the Respondent argues on brief at 28: "Schoppman's action can best be described as a proactive termination in anticipation of Freeman's imminent resignation."

As noted in greater detail supra, Delanor Manson, who began on July 4 as the Hospital's assistant administrator, clinical operations, received complaints from Nursing Supervisor Isaac Saroic and Director of Nursing Bailey from the commencement of her employment to about the date of the election that Steen was not a team player, was complaining of assignments and by body language and facial gesture was intimidating to supervision and management. Manson took no initial action because neither Saroic nor Bailey provided documentation and Steen's personnel record suggested no pattern of inadequate behavior.

Bailey again asked Manson to "take care of this situation" respecting Steen in early August and on Manson's request reduced her request to a memo. The memo quoted in part supra, recites an employee complaint and makes recommendations:

Verona [Steen] is very "negative" about Vencor, always making threats to go to the Labor Board or the State when anything out of the ordinary happens. Wanda feels this creates a very stressful environment for her and her team members as the workload is heavy enough without the added stress of having to deal with someone's negative attitude.

In addition to this issue with Verona, she has a history of complaining about her assignment at the beginning of the shift. See attached documentation from Isaac Saroic, relief house supervisor.

My main concern is the impact of Verona's negative attitude toward Vencor as an organization can have on the entire night shift, which in turn, may affect patient care.

. . . .

I am bringing this matter to you[r] attention knowing that you will deal with it in the proper manner. If I can be of assistance or should you need more information, please let me know.

Thereafter Manson had Cohen investigate the situation and met with and disciplined Steen as described above. The disciplinary session was worthy of comment for the vagueness of the criticisms directed to Steen and for the lack of a detailed reply to her requests for specificity respecting her conduct. The disciplinary warning asserted in part that Steen exhibited: "Negative uncooperative attitude, failure to work as a team player." The factual basis was:

Reports from coworkers, complains about assignments, not following chain of command, does not demonstrate a sincere commitment to the company by negative attitude. Creates a stressful environment for coworkers. Is not a team player.

The General Counsel and the Charging Party argue that Steen's performance seemingly suffered a major change. In April 1994 Steen had won the Respondent's "Vencor Touch Award" with a letter put in her personnel file over the signature of Schoppman congratulating her in part: "Your hard work and positive attitude are a valuable asset to our team." Later in April she is identified by Bailey to the Respondent's management team as the instigator of the Union and in May the assistant administrator calls for monitoring and getting rid of Steen and other disloyal union supporting employees.

Bailey initially tries to have Manson—a new supervisor—discipline Steen before the election, but fails. She tries again in August and finally succeeds.

All of this, argue the General Counsel and the Charging Party, is palpable pretext and fraud seeking to cloak the true illegal motive for the warning: Steen's recognized role in instigating the Union. They argue further that the vagueness of the Respondent's criticisms of Steen on closer inspection reveals from the Respondent's own documents that the motivation behind the imposition of the discipline was complaints about Steen's protected activities, such as the complaint that she threatened go to "the Labor Board," which complaints were changed by the Respondent in its attempts to conceal its motivations into the more general appellations of "complaints from coworkers," "not a team player," "negative attitude," etc.

The Respondent argues that it properly requires cooperation and a civil attitude from all its employees as part of its team approach to patient care and emphasizes Manson's responsible approach to the entire matter and the absence of any evidence that she was aware of Steen's role in the union organizing campaign. The Respondent argues that it was only Manson and not Bailey or others who determined to discipline Steen. Further the Respondent notes that the discipline was administered on August 19 over 1 month after the union election and that the General Counsel improperly argues that "the managers at Vencor would forever harbor animus toward employees who allegedly support the union." (The Respondent's Br. at 63.)

The discipline of Steen presents another unusual personnel action which, while to an extent plausibly explained by the Respondent, falls to the broader evidence of animus directed at the employee for union activities. The record as noted in part above shows specific and high level animosity directed to Steen as a believed instigator of the union campaign and high level stated intentions to monitor and remove union supporters such as she.

The Respondent's argument that Manson was an unknowing and therefore innocent actor in determining to discipline Steen fails because, as the written warning itself and the events leading up to it make clear, the discipline was based on—and Manson initiated her investigation in response to—the suggestions of Bailey and the complaints of coworkers. Both the actions of Bailey and the coworker complaints, quoted in part above, were, I find, directed toward and tainted by animus against Steen's union and protected activities. These complaints therefore may not constitute support for benign discipline.

So, too, the Respondent's argument that the time of Steen's discipline was so far removed from the union campaign that any preelection animus would have faded away does not withstand analysis. First, the election in mid-July was not an end to the union campaign in as much as the one election produced determinative challenges and union objection.

¹⁶ Thus, the coworker complains that Steen threatened to go to the Labor Board and that this reflects her negative attitude and refusal to be a team player. Acting House Supervisor Saroic held the same position as Bogle-Lewis and presumably received the same instructions and information at union campaign meetings about the need to monitor and get rid of union supporters. His complaints include Steen asking for a hospital or state form for the reporting of an incident

tions neither of which were resolved during the events at issue. Also, the second election in the technical unit—in which Steen was a member—held on July 15 produced a tally of ballots and subsequent certification in favor of the Union. These events carried with them the likelihood that the Union would be dealing with the Employer for at least some time in future. Further, and more importantly, the complaints and motivations that initiated the process culminating in Steen's discipline commenced in early July before the election. Finally, the fact that the entire process culminated in the administration of discipline in mid-August some 5 weeks after the election simply does not support an argument that so much time had passed that passions and animus would have faded away given that Steen was identified as the instigator of the union drive which had in part been successful.

Analyzing the Steen allegation in accordance with the Board's *Wright Line* test, as set forth supra, I find that the General Counsel has established that, had their been no union organizing drive and no union election campaign, Steen would not have suffered either Bailey's efforts to cause Manson to discipline her nor the complaints directed toward her which ultimately formed the basis of the August discipline administered to her.¹⁷

Given all the above I find that the Respondent administered discipline to Steen on or about August 19 because of her union and protected activity and because agents of the Respondent believed that she had initiated the union campaign at the Hospital. I therefore find that the Respondent's administration of discipline violated Section 8(a)(3) and (1) of the Act. I therefore sustain the General Counsel's complaint allegation respecting Steen.

c. The allegations respecting Michael Wade

The General Counsel and the Charging Party advance the discharge of Michael Wade as a classic example of an employer who had demonstrated animus toward the Union and knowledge of an employee's union activities seizing on a pretext to cloak the discharge of the employee for his union activities. As earlier argued, the Respondent denies both hospital animus against the Union and the relevant agents' knowledge of Wade's union activities. It argues further, however, that, even were the General Counsel to have established an initial case under *Wright Line*, the

Respondent has established that Wade would have been terminated even in the absence of his alleged union activity. Therefore, General Counsel failed to establish that Respondent violated Section 8(a)(3) by terminating Wade. (The Respondent's Br. at 54.)

As set forth in detail supra, I have found that various of the Hospital's administration, including Schoppman, expressed interest in identifying who among their employees supported the Union and took the position that such employees were disloyal and inimical to the Hospital's interests. Thus, I find that the Respondent, including Schoppman, harbored clear animus toward the Union and employee union supporters.

As the Respondent points out Michael Wade was evidently not active in the initial union organizing. He did attend the putative representation hearing on May 19 however, and testified he was sympathetic to the Union's view in a hospital conducted employee union campaign meeting. In all events, Wade was the only employee, insofar as the record indicates, called in to the Regional Director's office, told by the Regional Director he was "pegged kind of as a union leader" and unsuccessfully recruited "as a guy that could help us turn the corner on this [Union] thing." He was also clearly and explicitly identified as a union supporter and someone who should be monitored and gotten rid of after he attended the representation hearing.

Schoppman testified that she was aware of Wade's meeting with Turner and his attendance at the canceled representation hearing, but further testified that neither she nor Turner held any opinion respecting Wade's support for or activities on behalf of the Union. For the reasons delineated at length supra, I simply reject Schoppman's testimony in these regards. Rejecting her testimony on both demeanor and probability grounds and drawing the fair inferences from the credited testimony respecting events as described supra, I affirmatively find that Schoppman at the very least took as a firm working hypothesis, if not conviction, that Wade was, in Turner's words, a union leader. Further, I find that Schoppman like Turner, as is evident from his remarks to Wade as set forth above, viewed Wade as an employee who by virtue of his maturity and experience might be looked to by other employees as an example to follow. Thus, I find that Wade was even worse than a union supporter in the Hospital's view, he was a probable leader of employees whose support for the Union might well influence other employees to support it as well. Further, the Respondent's knowledge of Wade's union support and disapproval of those activities had previously been found. Diane Ashby, Wade's immediate supervisor, violated Section 8(a)(1) of the Act by telling Wade that he "shouldn't be with the Union."

The Respondent's animus respecting and knowledge of Wade's union activities are clearly established. The timing of Wade's discharge adds support to the General Counsel's case in that the discharge arose out of events that took place essentially immediately after the wrongful termination and escorting out of the building of Freeman by Schoppman. There is further apparent connection in the testimony of Schoppman that her initial unfavorable impression of Wade that morning was taken when she observed Wade and Tal Lewis talking to Freeman in the hall after her termination.

From all the above and the record as a whole, I find that the General Counsel has met his burden of persuasion that antiunion sentiment was a substantial and motivating force in the decision to discharge Michael Wade. It is relevant then to turn to the Respondent's affirmative defense that it would have taken the same action against Wade, even if the employees had never initiated a union organizing campaign or Wade was never thought to have been a union supporter.

Consideration of the Respondent's asserted reason for Wade's discharge must start with the conflicting evidence respecting the Hospital's practice and protocols respecting the conduct of respiratory therapists during a Code Blue. I find

¹⁷I reach this conclusion without finding that Manson took her actions with malign intent or knowledge of Steen's apparent initiation of the union campaign. It is sufficient to sustain the General Counsel's allegation simply to find that the causes underlying Manson's initiation of the disciplinary process and the reports and complaints on which it ultimately relied were fatally tainted with antiunion and antiprotected activity bias.

that the multidisciplinary "Cardiopulmonary Resuscitation" policy with its reference: "The Respiratory Therapist assigned to the coding patient will stay with the patient," was applicable policy at the Hospital at relevant times. In making this finding I credit the testimony of Schoppman, Hoffman, and Ashby, and discredit Lewis and Wade and Bogle-Lewis to the contrary. More importantly, I find that both Ashby and Schoppman believed this was true and further believed that all respiratory therapists at the Hospital knew or should have known of this fact. In reaching this conclusion I credit the testimony of Schoppman, Hoffman, and Ashby that the relevant respiratory therapists they interviewed during the course of their interview told them this was so.¹⁸

Given the recitation of Schoppman and Ashby of the matters disclosed during their investigation including (1) what they learned respecting the general knowledge of the Hospital's protocol respecting code blue announcements, (2) their issuance of the various quoted memoranda and, (3) their testimony of their motivations and decision making processes concerning Wade, to discredit the two on this record, in essence, would require a finding that they were engaged in an elaborate fraud to create a pretext or excuse, or relied on and inflated the import of a patient care mistake by Wade not sufficiently serious to justify his termination, to fire Wade. Further it would require that I reject their testimony respecting their professional evaluation of patient care needs. I recognize that I have discredited the Respondent's agents including Schoppman and Ashby respecting portions of their testimony. I further recognize that I have found that the General Counsel has established, through the Respondent's knowledge of and animus regarding employees' union activities, a strong initial case and that the burden of persuasion at this point in the analysis lies with the Respondent to establish its affirmative defense. It is a different and additional step to discredit these witnesses respecting their professional judgment respecting the importance of matters concerning patient care in a serious situation such as that presented during a Code Blue.

Having considered the record as a whole, including in particular the demeanor of the relevant witnesses during the testimony important here, I find that the Respondent has met its burden of persuasion that the Respondent would have discharged Wade for failing to remain with his assigned patient during the code on June 16, in all events, even were the employees never to have engaged in union activities. Simply put, the consistent and not directly challenged evidence that Schoppman and Ashby strongly believed a respiratory therapist must stay with his or her assigned patient during a code and, that they also believed that the Hospital's respiratory therapists knew this was their obligation turned the result in this portion of the case. The evidence is that during the course of the Respondent's investigation of the events, every respiratory therapist, save Wade and Lewis, confirmed to Ashby and/or Schoppman their understanding of the protocol's requirement that the assigned respiratory therapist stay with the patient.

Given that the Respondent has established the protocol, the general knowledge of the protocol among other respiratory therapists, the failure to comply with the protocol by Wade, and the strong views of Schoppman and Ashby respecting the need to comply with the protocol, I find that the evidence is sufficient to find and I specifically do find that Wade would have been discharged for failing to remain with his assigned patient in the context of the events as they occurred even had the Union never been on scene.¹⁹ This being so, the Hospital's affirmative defense is sustained and the allegation of a violation of Section 8(a)(3) and (1) respecting Wade is without merit and shall be dismissed.

IV. REPRESENTATION CASE MATTERS

A. Report on Challenged Ballots

As noted, supra, the parties stipulated to the ineligibility of two challenged ballots to leave the remaining challenged ballots insufficient to affect the outcome of the election. The stipulation further provided a certification of results should be issued reflecting the fact that the Petitioner did not receive a majority of valid votes cast in the election. I accepted the stipulation of the parties and hereby find that a majority of ballots were not cast for the Petitioner in the election. I shall include a certification of this fact in my recommended Order herein.

Given that the challenges are no longer determinative, I shall not further address the validity of the remaining challenged ballots nor issue a report respecting them.

B. Report on Petitioner's Objections and Other Matters Concerning the Conduct of the Election

The Regional Director's August 8, 1995 report on challenges and objections, order directing hearing, notice of hearing and order consolidating cases directed that a hearing be held on the Petitioner's July 21, 1994 objections to conduct affecting the result of the election, and to other investigative disclosures as alleged in the consolidated complaint in paragraphs 6, 7, and 8 as quoted supra.

1. The Petitioner's objections

a. Objection 1

The Petitioner's Objection 1 states:

The Employer engaged in surveillance and intimidation of votes by placing a supervisor(s) at a payroll table in the hallway directly outside the voting areas which was also the only access to the voting area. The placement of the payroll table at that location was also contrary to the agreement reached at the pre-election conference with regard to where the paychecks would be distrib-

¹⁸ The Charging Party and the General Counsel objected frequently during the course of Ashby and Schoppman's testimony respecting what they were told by other employees during their investigation. The testimony was neither offered, received, nor considered for the truth of what those reporting employees actually knew or believed, but was received and on this record credited for the proposition that those employees told agents of management the things testified to by them

¹⁹To the extent my findings imply a credibility resolution respecting the motivations of Ashby and Schoppman, I find that their testimony respecting the severity with which they viewed Wade's perceived deficiencies should be credited. I have as noted disbelieved their denials respecting other aspects of their testimony, but crediting this central proposition is enough to sustain the burden of persuasion the Respondent bears at this point in the analysis.

uted. At that time the Employer made the representation that checks would be given out in their normal fashion in the office on the other side of the Hospital.

The election was conducted in three sessions: 6–9 a.m., 12–3 p.m., and 6–9p.m. on July 15. The balloting was conducted in the Hospital's dining area which had been isolated from the cafeteria for the purposes of the balloting.

July 15 was a regular staff payday. While paychecks are normally distributed in the office, on this day Respondent distributed paychecks from a table located in a hallway leading to the dining area some 28 feet outside the voting area. The table was in the hallway used to enter the dining area, but was not visible from within the dining area itself.

Freeman, who was an observer for the Union, testified she saw a "vast" number of employees receive their paychecks at the table from a payroll employee stationed at the table along with certain other Vencor supervisors that day. She also identified Dawn Quinlan, the director of rehabilitation, as present at the table conversing with employees as they picked up their checks that day. Freeman was in the dining room and unable to observe the table during the election sessions however.

Wade was also a observer for the Union in the first voting session. He testified that the table was in place and being used to distribute paychecks that morning. He identified the payroll employee and Quinlan at the table. Steen testified she was an observer for the Union at all three voting sessions. She did not observe the payroll table until after the first voting session. Returning to the area in anticipation of the second session, Steen was waived over to the table by the payroll employee there and given her own paycheck.

Schoppman testified that the Hospital consciously changed the payroll distribution procedure on elections day:

Well, it was obvious that there was going to be blocks of time that a large number of employees would be arriving to the facility—6:00 a.m. to 9:00 a.m., 12:00 to 3:00, and then 6:00 to 9:00 p.m. So, we had the payroll clerk available—in the hallway, with the checks, so that as people—as the employees arrived on site they could get their checks at the same time. One of the reasons for doing this also was to prevent a lot of traffic in and out through the hospital that day, particularly, so that we had some consistency and some maintenance of order.

She disputed that any assigned staff at the table were supervisors and testified that Hospital supervision were specifically instructed that they were not to loiter about the polling areas. She also testified that, once each year for the preceding 2 years, a payroll table had been utilized, albeit in a different area of the Hospital, during an audit process to check the identification of employees in conjunction with distribution of payroll checks.

On brief at 35 the Petitioner argues:

Vencor also interfered with the election by setting up a payroll table, staffed by supervisors and other members of Vencor management, in the hallway outside the polling area. *Electric Hose & Rubber Co.*, 262 NLRB 186 (1982) (supervisor's presence outside polling area); *Performance Measurements Co.*, 148 NLRB 1657, 1659

(1964) (same). The election should be overturned on this additional ground as well.

The Respondent does not dispute that it determined to utilize a payroll table or its use in distributing checks that day. Counsel argues, however, that the three observer witnesses for the Union were each in the dining area during the voting sessions and admittedly could not and did not testify to the presence of supervisors at the payroll table or in the voting area during the election. The Respondent therefore argues that the Union has not shown improper conduct by the Hospital. The Respondent argues further that "the mere presence of a supervisor at or near the polls, without more, does not constitute election interference" citing *Roney Plaza Management Corp.*, 310 NLRB 441 (1993), and *Standard Products Inc.*, 281 NLRB 141 (1986). (R. Br. at p. 81.)

Considering the testimony and arguments of counsel, I agree with the Respondent that there is insufficient evidence to support a finding that statutory supervisors were involved in distributing paychecks from the payroll table during the actual balloting. I reject the argument of the Respondent that there is insufficient evidence to find that the payroll table was used to distribute checks during the election balloting. The three union witnesses testified that they saw many employees receiving checks at the table before and after the balloting. Schoppman testified the tables were used to distribute checks that day and did not persuasively suggest a limitation as to time or that the distribution was not done during the balloting. The testimony of regular activity before and after the balloting sessions combined with the absence of evidence that the distribution was discontinued during the balloting is, on this record, sufficient to support a finding that the distribution was continuous.

The Board issued an important case dealing with election payroll distribution cases, *Kalin Construction Co.*, 321 NLRB 649 (1996). *Kalin* adopts a strict rule, specifically applicable to all pending cases, that employer changes in the paycheck, the time of paycheck, the location of paycheck distribution or the method of paycheck distribution in the period immediately preceding the polling, absent a showing of motivation under a legitimate business reason unrelated to the election, is per se objectionable conduct.

In the instant case there is no question that the Hospital changed its time location and method of paycheck distribution in the 24-hour period preceding the conclusion of the polling and did so because of the election. The Board's *Kalin* rule therefore applies holding such conduct objectionable and destructive of the laboratory conditions necessary for a fair election. I shall therefore recommend that the Petitioner's Objection 1 be sustained and that a new election be directed because of the Hospital's noted changes in its paycheck distribution process on the day of the election.

b. Objections 2, 3, and 4

The Petitioner's Objections 2, 3, and 4 were not completely litigated and were not advanced as meritorious or requiring a new election on brief by the Petitioner. On this record they may fairly be regarded as abandoned and con-

structively with drawn. $^{20}\ {\rm I}$ shall take no further action with respect to them.

c. Objection 5

The Petitioner's Objection 5 asserts:

The Employer terminated Michael Wade and Viviana Freeman for exercising their rights under Section 7 and appearing at the NLRB to testify in the hearing scheduled for the Representation Petition's in Case Nos. 31–RC–7182 and 31–RC–7183.

This objection matches completely the General Counsel's complaint paragraph 9. I have sustained the General Counsel's complaint allegation as to Viviana Freeman, supra, finding her termination on June 16 in violation of the Act. I have dismissed the complaint allegation respecting the discharge of Michael Wade. The objection as to Wade therefore lacks merit and I shall recommend that it be overruled. The element of the objection dealing with Freeman is discussed, infra

2. Other investigative disclosures²¹

The Regional Director's Report on Objections directs a hearing respecting both the objections and "other investigative disclosures" which are identified as matters included in the General Counsel complaint paragraphs 6, 7, and 8. I have sustained the General Counsel's complaint allegations at paragraphs 6, 7, and 8 in their entirety. The wrongful conduct alleged in those complaint paragraphs occurred on or about April 28 and May 13 within the period limited by the representation petition's filing on April 28 and the election on July 15, 1994.

Summarizing the findings above, I have found that the actions of the Respondent alleged in the portions of the complaint sustained by me, supra, occurring in the period extending from the filing of the petition to the election are the only acts which should be further considered in determining if a new election is required. Those wrongful acts are:

Regional Director Turner's April 29 interrogation of respiratory therapist Wade concerning his union activities and sympathies and creation of impression of surveillance of the employees union activities and/or sympathies.

Director of Respiratory Therapy Ashby's April 29 interrogation of respiratory therapist Wade and direction that employees cease their union organizing activities.

Administrator Billie Ann Schoppman's May 13 interrogation of LVN Viviana Freeman concerning her union activi-

The June 16 discharge of LVN Viviana Freeman because of her support for the Union and in order to discourage employees from engaging in union activities.

The Respondent argues that the employees involved in these events were not at any time actual or potentially eligible voters in the election under contest herein, ²² and that the record contains no suggestion that the unit employees in the nonprofessional unit, which is the only unit and only election relevant herein, had been or were likely to have been affected by the events respecting Wade and Freeman. The Respondent thus argues that the objections dealing with the complaint allegations should be overruled and the matters concerning the "other conduct" should likewise be found wanting. The Petitioner argues that the employees who were the victims of the wrongdoing were not simply voters in another bargaining unit, but were rather union leaders in a single union organizing campaign which involved multiple elections on the same day respecting the same employer at the same location.

The Board has long held that conduct found violative of the Act is "a fortiori, conduct which interferes with the exercise of a free and untrammeled choice in an election unless it is virtually impossible to conclude that the conduct affected the election." *Dal-Tex Optical, Inc.*, 137 NLRB 1782, 1786–1787 (1962). The Board further holds:

The only recognized exceptions to this policy are where the violations are such that it is virtually impossible to conclude that they could have affected the results of the election. (Super Thrift Markets, 233 NLRB 409, 409 (1977); Establishment Industries, 284 NLRB 121 (1987).)

The Board has found employer conduct respecting employees in one bargaining unit to have a coercive impact on employees in a second unit and hence constitute objectionable conduct respecting the second unit. *Vegas Village Shopping Corp.*, 229 NLRB 279, 280 (1977).

In considering if unfair labor practice conduct is so isolated or de minimus that it would be virtually impossible for it to have affected the election, the Board takes into consideration the number of violations found, their severity, the size of the unit, and other relevant factors. *Eskaton Sunrise Community*, 279 NLRB 68, 80 (1986); *Caron International*, 246 NLRB 1120 (1979). Given the situation presented herein, that process must take specific account of the multiple election context, but still focus only on the impact on the bargaining unit and election at issue herein.

In looking at the impact of the wrongful discharge of Freeman, I have found supra, that she was an active union supporter. Such an employee's discharge simply does not pass unnoticed by other employees. Indeed, as testified by Schoppman, Freeman's departure from the facility on the day of her termination created employee confusion. The Board in *Pilgrim Foods, Inc.*, 234 NLRB 136 fn. 2 at 137 (1977), noted that the discharge of a leading union adherent before an election is not a matter simply of elimination of a union vote, but rather has the greater impact of discouraging employees' organizing efforts. On this record, and specifically considering the entire context including the several unusual elements presented, I find that Freeman's discharge had a

²⁰ Were it necessary to reach the merits of these objections on the current record, I would find that the Petitioner had failed to meet its burden with respect to each. Therefore, were it necessary, I would recommend each be overruled.

²¹ The complaint in paragraph 10 alleges, and I have sustained the allegation, supra, that the Respondent's issuance of a warning to Verona Steen on August 18, 1994, violated the Act. Inasmuch as this conduct occurred after the July 15 date of the election, it is not relevant to the determination of whether a new election should be directed

²² Wade and Freeman during their employment were in the technical bargaining unit noted supra in which the Union received a majority of votes cast in the election on July 15 and in which unit the Union subsequently was certified as the representative of employees.

significant affect on the unit and election involved herein and that under the Board standards articulated above, a new election is required.

The other two independent violations of Section 8(a)(1) of the Act during the preelection period, as noted supra, may well stand in sufficient isolation so that, were they the only conduct under consideration, direction of a new election would not be appropriate. Viewed in conjunction with the Freeman discharge however, there is no doubt that the two violations of Section 8(a)(1) of the Act simply augment and fortify my earlier conclusion that the discharge of Freeman, without more, requires a new election be directed. Accordingly, I sustain that portion of the Charging Party's objections dealing with the Freeman discharge and the portion of the "other conduct" alleged in the complaint found violative of the Act, supra. I find that the Respondent's conduct destroyed the necessary laboratory conditions for a fair election and, in consequence, shall recommend that a new election be directed based on this objection and other conduct independent of the matters concerning the payroll table.

3. Summary of rulings on objections and "other conduct"

I have sustained the Charging Party's Objection 1 to the extent it alleges impermissible changes in the Respondent's payroll practices in the 24-hour period immediately before the conclusion of balloting. I have dismissed the Charging Party's Objections 2, 3, and 4 as abandoned.

I have considered the Charging Party's Objection 5 in conjunction with the "Other Conduct" instructions of the Regional Director's report on challenged ballots as putting into issue the conduct earlier found to violate the Act during the critical preelection period. In that context I have found that the wrongful discharge of Freeman, both independently and in conjunction with the independent violations of Section 8(a)(1) of the Act, destroyed laboratory conditions and require that a new election be directed.

I have therefore determined that the election should be set aside on each of the two grounds noted above and, a new election directed. I shall therefore recommend that the Board direct such a new election including the traditional notice of election required in such situations as set forth in *Lufkin Rule Co.*, 147 NLRB 341 (1964).

THE REMEDY

Having found that the Respondent has violated the Act, I shall direct it to cease and desist therefrom, and take certain affirmative action in order to effectuate the purposes and policies of the Act, including the posting of a remedial notice consistent with the Board's recent modifications to its standard remedies in *Indian Hills Care Centers*, 321 NLRB 144 (1996).

As found, supra, Viviana Freeman was improperly discharged on June 16 by means of accelerating the date of her planned resignation from the Hospital and accepting that resignation. Since the time is now well past her announced and intended resignation date, no order requiring that she be offered reinstatement is appropriate. Inasmuch as she was paid by the Respondent for the time she would have worked in the period after her termination but preceding her announced resignation time, it is also unnecessary to direct that she be

made whole for lost wages or benefits. I shall however retain the traditional record expulsion and employee notification provisions associated with a wrongful discharge remedy.

CONCLUSIONS OF LAW

- 1. The Respondent is and has been at all relevant times an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
- 2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
- 3. The Respondent violated Section 8(a)(1) of the Act by engaging in the following acts and conduct:
- (a) Interrogating employees concerning their union activities
- (b) Creating the impression of surveillance of employees' union activities and/or sympathies.
 - (c) Directing that employees cease their union activities.
- 4. The Respondent violated Section 8(a)(3) and (1) of the Act by engaging in the following acts and conduct:
 - (a) Discharging Viviana Freeman.
- (b) Issuing an August 18, 1994 disciplinary warning to Verona Steen.
- 5. The unfair labor practices described above are unfair labor practices within the meaning of Section 2(6) and (7) of the Act.
- 6. The allegations of the complaint not specifically found to violate the Act above are without merit and shall be dismissed.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended²³

ORDER

I. ORDER RESPECTING UNFAIR LABOR PRACTICES

The Respondent, Vencor Hospital-Los Angeles, its officers, agents, successors, and assigns, shall

- 1. Cease and desist from
- (a) Coercively interrogating employees concerning their union activities.
- (b) Creating the impression of surveillance of employees' union activities and/or sympathies.
 - (c) Directing that employees cease their union activities.
- (d) Issuing disciplinary warning to employees because of their union activities and/or sympathies.
- (e) Discharging employees because of their support for the Union.
- (f) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the National Labor Relations Act.
- 2. Take the following affirmative action necessary to effectuate the policies of the Act.
- (a) Within 14 days from the date of this Order, remove from its files any reference to the warning issued to Steen and the discharge of Freeman and within 3 days thereafter, notify each employee that this has been done and that the

 $^{^{23}}$ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

warning and discharge will not be used against them in anyway,

(b) Within 14 days after service by the Region, post at its business office and other places where notices to their members are customarily posted copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director, in English and such other languages as the Regional Director determines are necessary to fully communicate with employees and union members, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure the notices are not altered, defaced or covered by other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 28, 1994,

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

II. RECOMMENDED ORDER RESPECTING THE REPRESENTATION CASE

- 1. The challenges to the ballots of Lorraine Adams and Terry Shock shall be sustained and the results of the July 15, 1994 election certified as follows: A Majority of Valid Votes Were Not Cast for the Petitioner
- 2. The Charging Party's Objection 1 and Objection 5, including the complaint conduct included by the Regional Director's report entitled "Other Conduct," are, and each of them independently is, sustained and a new election shall be directed consistent with the Board's practice in such circumstances. Other objections not specifically sustained herein are overfuled.
- 3. The following language provided in the Board's decision in *Lufkin Rule Co.*, 147 NLRB 341, 342 (1964), shall be included in the new notice of election to be issued in this matter:

The election conducted on July 15, 1994, was set aside because the National Labor Relations Board found that certain conduct of the Employer interfered with employees' exercise of a free and reasoned choice. There-

fore a new election will be held in accordance with the terms of this notice. All eligible voters should understand that the National Labor Relations Act, as amended, gives them the right to cast their ballots as they see fit, and protects them in the exercise of that right, free from interference by any of the parties.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT interrogate our employees about their union activities or sympathies.

WE WILL NOT create the impression that our employees' union activities are under surveillance.

WE WILL NOT direct our employees to cease their union

WE WILL NOT issue disciplinary warnings to employees because of their union activities and or sympathies.

WE WILL NOT discharge our employees because of their support for the Union.

WE WILL NOT in any like or related manner restrain or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL within 14 days of the Board's Order remove from our files any reference to the unlawful August 18, 1994 warning issued to employee Veronica Steen and WE WILL within 3 days thereafter inform her in writing that this has been done and that and that the warning will not be used against her in anyway.

WE WILL within 14 days of the Board's Order remove from our files any reference to the unlawful termination of employee Viviana Freedman and WE WILL within 3 days thereafter inform her in writing that this has been done and that and that the discharge will not be used against her in anyway.

VENCOR HOSPITAL-LOS ANGELES

²⁴ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''